IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
(ATLANTA DIVISION)

BLUE CROSS AND BLUE SHIELD OF GEORGIA, INC., *et* al.,	)	
Plaintiff,	)	CIVIL ACTION NO.:
v.	)	1:18-cv-01304-MLB
DL INVESTMENT HOLDINGS, LLC., *et al*.,	)	
Defendants.	)	

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANT JORGE PEREZ'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR A MORE DEFINITE STATEMENT

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INTRODUCTION

1. This Reply memorandum of law is submitted in further support of the motion by Defendant, JORGE PEREZ (herein, "PEREZ"), for an Order dismissing this matter pursuant to Fed.R.Civ.P. 12(b)(2), 12(b)(3) and12(b)(6), or for a more definite statement pursuant to Fed.R.Civ.P. 12(e).

2. This Reply is confined to the issues raised by Plaintiffs in their opposition, as well as issued raised subsequent to the filing of the Motion, in conjunction with the hearing of July 24, 2018, and motions/filings related thereto.

PROCEDURAL STATEMENT

3. The Complaint currently at issue in this matter is the Second Amended Complaint, which was filed on May 14, 2018 [D.E. #28].

4. PEREZ did accept service of the original complaint in this matter and filed the instant Motion to Dismiss [D.E. #35] (the "Motion").

5. On July 11, 2018, Plaintiffs filed their Opposition to the Motion [D.E. #44].

6. It is also relevant that while the Motion was/is pending, Plaintiffs did bring (1) Plaintiffs' motion for a temporary restraining order ("TRO") and preliminary injunction seeking a broad freeze of all Defendants' assets (the "Asset Freeze Motion") [D.E. #46], (2) Plaintiffs' motion for an order to preserve evidence

("Extraordinary Preservation Motion") also in [D.E. #46], and (3) Plaintiffs' motion for expedited discovery ("Expedited Discovery Motion") [D.E. #48].

7. PEREZ filed his opposition [D.E. # 61] to the Asset Freeze Motion (and related motions), and hereby incorporates same by reference, including PEREZ's Declaration of July 23, 2018, attached thereto and made a part hereof as Exhibit "A."

8. Further, the co-Defendants in this matter did file their opposition [D.E. # 54] to the Asset Freeze Motion (and related motions), and PEREZ hereby incorporates same by reference, including the Declaration of Lisa Zini dated July 22, 2018 [D.E. # 54-1], the Declaration of Aaron Durall dated July 22, 2018 [D.E. # 54-2], the Declaration of Neisha Carter Zaffuto dated July 22, 2018 [D.E. # 54-3], and. the Declaration of Jaquanda Smith dated July 22, 2018 [D.E. # 54-5].

REPLY ARGUMENT

POINT I – Plaintiffs Wrongly Suggest That The Burden Is On PEREZ To Clarify The Unclear Issues In The Complaint.

9. PEREZ's argument on the Motion is relatively simple; inasmuch as he is not at all similarly situated to the other Defendants, he merely wants to know why he is being sued.

10. In their Opposition to the Motion, Plaintiffs incredulously suggest that the burden is on PEREZ to explain why he does not understand the Complaint and that the burden is not on Plaintiffs to state a cause of action.

11. As to the tried and true case law cited by PEREZ, Plaintiffs criticize same, and actually argue two (2) things:

a. That globally alleging jurisdiction against all Defendants is proper; and,

b. Their burden is merely to establish PEREZ has sufficient contacts with the United States.

12. PEREZ is simply at a loss how to respond to what can only be described as bizarre arguments; further, now that there is "evidence" in the form of multiple filed declarations that PEREZ was not even involved with Chestatee Regional Hospital, the Motion must be granted.

13. As another case in point, PEREZ raised the issue of failure to address conditions precedent under Fed.R.Civ.P. 9(c). Plaintiffs responded with a convoluted argument of how PEREZ has no conditions precedent; presumably arguing that Plaintiffs are not required to comply with Fed.R.Civ.P. 9(c). Why not just agree to address the conditions precedent?

14. Notably, while PEREZ does not think he belongs in this case at all, he has not sought a decision on the merits at this time; merely a proper pleading.

15. With apology for repetition, PEREZ believes it is appropriate to return to the fundamental tenets of pleading, in the context of a motion to dismiss:

> Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests," *Conley* v. *Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957). While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, *ibid.; Sanjuan* v. *American Bd. of Psychiatry and Neurology, Inc.*, 40 F.3d 247, 251 (CA7 1994), a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do, see *Papasan* v. *Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986) (on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation"). Factual allegations must be enough to raise a right to relief above the speculative level, see 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp 235-236 (3d ed. 2004) (hereinafter Wright & Miller) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action"), on the assumption that all the allegations in the complaint are true (even if doubtful in fact), see, *e.g.*, *Swierkiewicz* v. *Sorema N. A.*, 534 U.S. 506, 508, n. 1, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002); *Neitzke* v. *Williams*, 490 U.S. 319, 327, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989) ("Rule 12(b)(6) does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations"); *Scheuer* v. *Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974) (a well-pleaded complaint may proceed even if it appears "that a recovery is very remote and unlikely").

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 554-56, 127 S. Ct. 1955, 1964-65 (2007).

16. *Twombly*, *id.*, went on to say:

> Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556, 127 S. Ct. 1955, 1965 (2007).

17. PEREZ notes that Plaintiffs have by separate motion sought expedited discovery [D.E. # 48], seeking to, amongst other things, "trace and identify the fraudulently acquired funds remaining in the Defendants' hands." Throughout this matter Plaintiffs have candidly admitted that they are unaware of any of such funds being given to PEREZ.

18. At the same time, on page 14 of their Opposition, Plaintiffs argue in paragraphs 178 through 202 of the Second Amended Complaint, the Defendants (**noting PEREZ is not mentioned in such paragraphs**) "concealed their scheme."

19. Plaintiffs cite to two (2) decisions of Judge Middlebrooks in the Southern District of Florida, for the premise they do not have to specify "fraud" as to PEREZ:

> The *Sahlen* Court also discussed the difficulty presented by cases against large corporations where, because the defendants are largely in control of all of the information necessary to establish wrongful conduct, it is virtually impossible for plaintiffs to know exactly who said what or omitted to say what, or who, amongst several potential responsible parties is the one "at fault." The Court held that in corporate fraud cases involving group-published information, a plaintiff need only plead the alleged misrepresentations with particularity and, where possible, each individual defendant's role in the misrepresentations. The Eleventh Circuit has stated that a fraud claim should include: (1) the precise statements which were made in what documents, or what oral representations or omissions were made; (2) the time and place of each such statement and the person responsible for making, or not making, the statement; (3) the content of each statement and the manner in which it misled the plaintiff; and (4) what the defendants obtained as a

> consequence of the fraud. *Brooks v. Blue Cross & Blue Shield of Fla., Inc.,* 116 F.3d 1364, 1371 (11th cir. 1997).

In re Trasylol Prods. Liab. Litig., No. 08-MD-1928-MIDDLEBROOKS, 2009 U.S. Dist. LEXIS 65481, at *67-68 (S.D. Fla. Mar. 4, 2009).

20. The second case cited by Plaintiffs for this premise is as follows:

> Both Plaintiffs and Defendants direct the Court to language in *In re Chari* where the court held that: "Although these claims of additional transactions are vague, the court understands the Trustee's limited ability to access information at the pleading stage and will not require the Trustee, "to include in [his] pleadings information only available from the defendants through discovery." *Board of Trustees v. Illinois Range, Inc.,* 186 F.R.D. 498, 503 (N.D.Ill.1999); *U.S. Trust Co. v. Raritan River Steel Co., Inc. (In re American Spring Bed Manufacturing Co.*), 153 B.R. 365, 374 (Bankr.D.Mass.1993) (noting that less stringent requirements for pleading fraudulent transactions are appropriate in a bankruptcy proceeding involving a trustee suing a third party since essential facts would be solely within the knowledge of the defendants and the trustee would have to rely on second hand information to plead his case). For these reasons, the court will not grant the Milfords' motion to dismiss or motion for a more definite statement on the Trustee's speculative claims at this stage. However, after the passage of sufficient time for discovery, the court will require the Trustee to amend his complaint to include more specific averments of any additional relevant facts uncovered during discovery." 276 B.R. 206, 214 (S.D. Ohio 2002).

Special Purpose Accounts Receivable Coop. Corp. v. Prime One Cap. Co., L.L.C., No. 06-61055, 2007 U.S. Dist. LEXIS 70886, at *17-18 (S.D. Fla. Sep. 25, 2007).

21. The problem with the cases cited by Plaintiffs is that they both support the position of PEREZ. Plaintiffs are neither the trustee in a bankruptcy proceeding,

nor is PEREZ a large organization.

22. Instead, a review of the two (2) cases, reveals that the 11th Circuit has required that Plaintiffs (at least as to PEREZ) identify:

> (1) the precise statements which were made in what documents, or what oral representations or omissions were made; (2) the time and place of each such statement and the person responsible for making, or not making, the statement; (3) the content of each statement and the manner in which it misled the plaintiff; and (4) what the defendants obtained as a consequence of the fraud. *Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1371 (11th Cir. 1997).

In re Trasylol Prods. Liab. Litig., No. 08-MD-1928-MIDDLEBROOKS, 2009 U.S. Dist. LEXIS 65481, at *68 (S.D. Fla. Mar. 4, 2009).

23. Plaintiff have utterly failed to apprise PEREZ as to his alleged wrongdoing.

24. Finally, Plaintiffs misread the argument as to "veil-piercing." PEREZ is once again merely seeking to clarify whether he is being accused of "working" for Chestatee Regional Hospital as an independent individual, or as an employee of one of the other Defendants, or as an employee of some un-named third-party. The failure to identify such simple facts is glaring, when the allegations of the Complaint appear to suggest a highly-complex, multistate "enterprise;" clearly PEREZ as an individual could not perform multiple jobs and be in multiple places all at the same time, while also running his other businesses in other states, as noted by Plaintiffs.

POINT II – Issues Raised In Conjunction With The Asset Freeze Motion.

25. As implicitly set forth in this Motion to Dismiss [D.E. #35], and explicitly set forth in his Declaration of July 23, 2018, PEREZ has virtually no knowledge or information about, and has had virtually no involvement with, Chestatee Regional Hospital.

26. As per the Declaration of July 23, 2018, Mr. Perez **was never formally employed by, or in relation to, Chestatee Regional Hospital, nor did he receive any funds whatsoever for work performed related to Chestatee Regional Hospital.**

27. Further, despite having "fringe" involvement at best, with regards to Chestatee Regional Hospital, PEREZ cannot possibly be implicated or liable for any of the counts as set forth in the Second Amended Complaint [D.E. #28].

28. Not only does PEREZ not belong in this suit, but without any evidence whatsoever that PEREZ received any funds which are the subject of the within proceeding, there is simply no factual basis to proceed against PEREZ.

29. Further, the other Defendants have submitted the following declarations, the relevant portions of which are hereby incorporated by reference:

a. The Declaration of Lisa Zini dated July 22, 2018 [D.E. # 54-1], wherein Ms. Zini confirms in paragraphs 12 and 13 that PEREZ did

not work for Chestatee Regional Hospital, and did not provide software or services;

b. The Declaration of Aaron Durall dated July 22, 2018 [D.E. # 54-2], wherein Mr. Durall confirms in paragraph 6 that PEREZ did not work for Chestatee Regional Hospital or Durall, made no investment therein, provided no business advice, had no involvement in management or operations, was not a decision maker, and was never employed or paid by the hospital;

c. The Declaration of Neisha Carter Zaffuto dated July 22, 2018 [D.E. # 54-3], wherein Ms. Zaffuto confirms in paragraph 5 that the software and billing program for Chestatee Regional Hospital, was actually provided by Medivance; and,

d. The Declaration of Jaquanda Smith dated July 22, 2018 [D.E. # 54-5], wherein Ms. Smith confirms in paragraphs 11 and 12 that PEREZ did not work for Chestatee Regional Hospital, and further, did not provide software or services. Ms. Smith further goes on to refute virtually any involvement of PEREZ whatsoever in the hospital.

30. The Plaintiffs have simply failed to properly plead a cause of action

against PEREZ. Further, despite providing "evidence" to the Court in conjunction with their motions, Plaintiffs have not provided any evidence whatsoever, implicating PEREZ in this matter.

31. All Defendants have however, provided evidence of PEREZ's non-involvement with Chestatee Regional Hospital.

32. As submitted by Plaintiffs, the Declaration of John Iacovelli dated July 11, 2018 [D.E. #46-2] only references PEREZ though a former "Reliance Labs Employee" (in paragraph 67) who indicates a belief that Reliance Labs (not Chestatee Regional Hospital) used Empower software. The other references to unsubstantiated "news" reports are of no weight in this proceeding, and certainly do not constitute "evidence."

33. As submitted by Plaintiffs, the Declaration of Kelly Smallwood dated July 2, 2018 [D.E. #46-3] (who appears to be the "source" John Iacovelli) only references PEREZ as being present occasionally and being on a single (1) phone call. The other references to unsubstantiated "news" reports are of no weight in this proceeding and certainly do not constitute "evidence."

34. Neither John Iacovelli nor Kelly Smallwood indicates that PEREZ was ever paid by Chestatee Regional Hospital.

35. Setting aside the glaring issues of "hearsay" and "speculation," there is

simply no evidence to support the granting of any relief as to PEREZ in the Second Amended Complaint.

POINT III – Overarching Considerations.

36. Plaintiffs do actually clarify their position a little in the Opposition. It appears they are saying as follows:

a. Plaintiffs presume the "guilt" of all Defendants;

b. Plaintiffs presume that conjecture and supposition, suffices for pleading "facts;"

c. Plaintiffs are not required to explain how PEREZ fits into this supposed "scheme;"

d. Any inability to be specific as to PEREZ is a result of the other "Defendants' efforts to conceal the scheme;" and,

e. To the extent there is any knowledge about what PEREZ allegedly did wrong, that information is only known to PEREZ.

37. In sum and substance, Plaintiffs would have this Court disregard that:

a. PEREZ has no idea what wrongdoing of which he is accused;

b. PEREZ had virtually no involvement with Chestatee Regional Hospital; and,

c. All parties agree PEREZ is not similarly situated with the other

Defendants and is entitled to his own set of "facts."

38. This would appear to be as clear a "fishing expedition" as undersigned counsel has ever seen, at least as to PEREZ. This was thought to be the case at the time the Motion was filed, but became crystal clear in conjunction with the hearings of July 24, 2018.

CONCLUSION

WHEREFORE, Defendant, JORGE PEREZ, respectfully requests an Order dismissing this matter pursuant to Fed.R.Civ.P. 12(b)(2), 12(b)(3) and12(b)(6), or for a more definite statement pursuant to Fed.R.Civ.P. 12(e)., together with such other, further and different relief as the Court deems just, proper and equitable under the circumstances.

Respectfully submitted, this 25th day of July 2018.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the font/margins in this brief comply with L.R 5.1.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served electronically via the Court's ECF system to:

ALL COUNSEL OF RECORD

This 25th day of July 2018.

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